

**JUDGE TERA L. SALANGO  
KANAWHA COUNTY CIRCUIT COURT  
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JUDICIAL ANNEX BUILDING  
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**FROM: Tera L. Salango, Judge**

**DATE: August 5, 2019**

**SUBJECT: Pomponio v. WV Dept. of Commerce; 19-C-574**

This transmission contains 5 pages plus cover sheet.

**MESSAGE:**

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**IMPORTANT**

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**IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA****BREN J. POMPONIO,****Plaintiff,****v.****Civil Action No. 19-C-574  
JUDGE Tera L. Salango****WEST VIRGINIA DEPARTMENT  
OF COMMERCE,****Defendant.****ORDER**

The parties came before this Court on July 17, 2019, for a hearing on the Plaintiff's *Complaint for Declaratory and Injunctive Relief Pursuant to the West Virginia Freedom of Information Act* ("WVFOIA"), and on the Defendant's Motion to Dismiss.

At the hearing and in pleadings provided previously, the parties indicated that the principal issue of disclosure of information requested under the WVFOIA had been resolved. Thus, the sole remaining issue for the Court to decide is whether a failure to satisfy the thirty-day notice provisions of West Virginia Code § 55-17-3(a)(1) deprives this Court of jurisdiction to rule on the Plaintiff's anticipated petition for attorney fees under the mandatory fee-shifting provisions of the WVFOIA. The Defendant contends that Plaintiff's acknowledged failure to satisfy the pre-suit notice requirements under §55-17-3 prevents this Court from exercising jurisdiction over the matter. Plaintiff contends that the policy underlying the WVFOIA statutes, the nature of information requests, and the emphasis on expediency in the language of the statute are in conflict with the pre-suit notice requirements, and as such, this Court should find that the WVFOIA is one of the contemplated provisions of law contrary to the pre-suit notice statute and inapplicable to

such actions. Both parties agree that the Supreme Court of Appeals has never directly addressed the issue before this Court.

The West Virginia Freedom of Information Act is a broadly conceived and liberally construed statute seeking to permit citizen access to official documentation, and if necessary, creating a judicially enforceable public right to secure the information from potentially unwilling official hands. See, *Farley v. Worley*, 599 S.E.2d 835, 215 W.Va. 412 (2004); *Queen v. West Virginia University Hospitals, Inc.*, 365 S.E.2d 375, 179 W.Va. 95 (1987). In declaring the policy of the WVFOIA, the Legislature found as follows:

Pursuant to the fundamental philosophy of the American constitutional form of representative government which holds to the principle that government is the servant of the people, and not the master of them, it is hereby declared to be the public policy of the State of West Virginia that all persons are, unless otherwise expressly provided by law, entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees.  
W. Va. Code § 29B-1-1.

The WVFOIA requires as follows: "The custodian, upon demand for records made under this statute, shall as soon as is practicable *but within a maximum of five days* not including Saturdays, Sundays or legal holidays: (1) Furnish copies of the requested information; (2) Advise the person making the request of the time and place at which he or she may inspect and copy the materials; or (3) Deny the request stating in writing the reasons for such denial." W. Va. Code § 29B-1-3 (d) (*emphasis added*).

Indeed, reference to speedy resolution of information requests made pursuant to WVFOIA appear elsewhere in the statute. W. Va. Code § 29B-1-5(3) provides: "Except as to causes the court considers of greater importance, proceedings arising under subsection one of this section shall be assigned for hearing and trial at the earliest practicable date."

The WVFOIA further directs that the Act shall be “liberally construed with the view of carrying out the [declaration of policy].” W. Va. Code § 29B-1-1.

The Supreme Court of Appeals has routinely upheld the clear and unambiguous language of W.Va. Code §55-17-3(a)(1) which requires pre-suit notice of a claim against a state agency thirty days prior to filing certain civil actions. In declaring the purpose of the notice requirement, the Legislature found that “there are numerous actions, suits and proceedings filed against state government agencies and officials that may affect the public interest” and that the litigation “may have significant consequences that can only be addressed by subsequent legislative actions.” Further, the Legislature found that agencies and officials need more notice and time to respond to such actions, and indeed, the Legislature itself needs more timely information regarding the actions “in order to protect the public interest.” Finally, subsection (a) provides that “the public interest is best served by clarifying that no government agency may be subject to awards of punitive damages in any judicial proceeding.”

West Virginia Code § 55-17-3(a)(1) requires thirty day notice in certain “actions against government agencies. However, the term “action” as used in West Virginia Code §§ 55-17-3(a)(1) and 55-17-3(a)(2) is defined in West Virginia Code § 55-17-2 as:

a proceeding instituted against a governmental agency in a circuit court or in the supreme court of appeals **except actions instituted pursuant to statutory provisions that authorize a specific procedure for appeal or similar method of obtaining relief from the ruling of an administrative agency** and action instituted to appeal or otherwise seek relief from a criminal conviction, including, but not limited to, actions to obtain habeas corpus relief.  
W. Va. Code § 55-17-2

The present action, seeking injunctive relief under the WVFOIA, is plainly an action “instituted pursuant to statutory provisions that authorize a specific procedure for appeal or similar method of obtaining relief from the ruling of an administrative agency.”

The WVFOIA expressly states that “any person denied the right to inspect the public record of a public body may institute proceedings for injunctive or declaratory relief in the circuit court in the county where the public record is kept.” W.Va. Code § 29B-1-5. Such language, when subject to a liberal interpretation, indicates the Legislature’s intent to include within the WVFOIA statute a “statutory provision that authorize[s] a specific procedure for appeal or ...obtaining relief from an agency’s ruling.”

In the instant matter, the Plaintiff properly requested documents from the Department of Commerce regarding its expenditure of funds allocated to the WV Rise program. The funds in the WV Rise program are intended to repair or reconstruct single-family housing and single-family rental units affected by the historic June 2016 flood. Specifically, the program was designed to provide assistance to low income West Virginians who require assistance to repair, replace, or reconstruct their homes.

State agencies such as the current Defendant are required to respond to WVFOIA requests within five (5) days of receipt. Here, the Defendant failed their statutory duty to respond to the Plaintiff’s requests until seven (7) months after the initial request was made, and only after learning that the instant lawsuit had been filed. Defendant’s lapse in fulfilling its obligations under the statute is unjustifiable and Plaintiff rightly resorted to the specific statutory remedy provided within the WVFOIA to seek relief from the agency.

Based on this rationale, and the obvious need for judicial oversight of this particular information request, this Court FINDS that West Virginia Code § 55-17-3(a)(1) does not deprive it of jurisdiction in this matter and DENIES the Defendant’s Motion to Dismiss.

Further, this Court hereby ORDERS Plaintiff to submit a memorandum detailing the hours expended in resolving the information request within 14 days of the entry of this Order.

The Court directs the Clerk to provide copies of this Court to all parties of record to this action.

Entered this 5<sup>th</sup> day of August, 2019.

A handwritten signature in black ink, appearing to read 'T. Salango', is written over a horizontal line.

Honorable Tera L. Salango